LIBRARY
SUPREME COURT, U. S.

71-746

NO.

Supreme Court, U.S.
FILED
DEC 4 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1971

J. W. HARGROVE, PLAINTIFF-APPELLANT,

-vs-

C. L. NEWSOME, et al., DEFENDANT-APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

JURISDICTIONAL STATEMENT

WILLIAM W. HALL
10 Arcade
Dickson, Tennessee

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT
Oliver B. Dickins
Life & Casualty Tower
Nashville, Tennessee 37219

Attorneys for Plaintiff-Appellant.

TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
The Facts	5
Trial Court Proceedings	6
Proceedings in the State Supreme Court	7
WHY THE QUESTIONS ARE SUBSTANTIAL	8
PART ONE: THE FEDERAL QUESTIONS ARE SUBSTANTIAL	9
I. STATE LAW BACKGROUND: THE JACKSON RULE REQUIRES PRODUCTS LIABILITY CLAIMS TO BE FILED WITHIN ONE YEAR OF SALE EVEN THOUGH THE INJURIES COMPLAINED OF OFTEN OCCUR AFTER THAT TIME	9
II. THE PRINCIPLE OF JACKSON V. GENERAL MOTORS DENIES PLAINTIFFS PROCEDURAL DUE PROCESS BY FAILING TO AFFORD THEM A REASONABLE OPPORTUNITY TO PRESENT VALID CLAIMS	12
A. Due Process Requires that Parties be Given a Full and Reasonable Opportunity to Present Claims	13
B. The Jackson Rule Does Not Allow Plaintiffs a Hearing on the Material Issues of their Claims	16
C. This Court Has Long Held that Due Process Requires Reasonable Limitation Periods	21
D. Because Jackson's Limitation is so Short that it Denies a Reasonable Opportunity to be Heard, it is a Denial of Due Process	22
III. THE JACKSON RULE DISTINGUISHES BETWEEN THOSE PERSONS ENTITLED TO THE FUNDAMENTAL CONSTITUTIONAL INTEREST OF ACCESS TO THE COURTS WITHOUT BEING JUSTIFIED BY A COMPELLING STATE INTEREST; HENCE IT DENIES EQUAL PROTECTION OF THE LAWS	23

Page

A. Equal Protection Clause Requires a Compelling State Interest to Justify Discrimination Against the Exercise of a Fundamental Constitutional Interest. 23

B. Access to the Courts is Indubitably a Fundamental Constitutional Right Entitled to the Maximum Protection of the Equal Protection Clause 25

C. Tennessee Has No Compelling Interest in its Differentiation Among Those Entitled to Sue. 27

PART TWO: THE EXISTENCE AND EXERCISE OF JURISDICTION 29

IV. THE NATURE OF THE CASE AND THE DECISIONS OF THIS COURT BRING THIS CASE WITHIN SECTION 1257(2). 29

V. REVIEW IN THIS COURT IS NOT PRECLUDED BY THE STATE PROCEDURAL GROUND. 30

VI. THE FEDERAL QUESTION WAS TIMELY. 33

PART THREE: THE QUESTIONS REQUIRE PLENARY CONSIDERATION. . . 35

CONCLUSION. 38

TABLE OF AUTHORITIES

Cases

	Page
Armstrong v. Manzo, 380 U.S. 545 (1965)	14, 17, 20, 22, 36
Barbour v. Erwin, 82 Tenn. 716 (1885)	19
Bates v. Shapard, 461 S.W.2d 946 (Tenn. 1970)	10
Bell v. Burson, 402 U.S. 535 (1971)	15, 22
Boddie v. Connecticut, 401 U.S. 371 (1971)	15, 22
In re Brown, 135 U.S. 662, 701 (1890)	22, 36
Brown v. State, 466 S.W.2d 527 (Tenn. Crim. App. 1971)	37
Cardinale v. Louisiana, 395 U.S. 437 (1969)	33
Cohen v. California, 91 S.Ct. 1780 (1971)	30
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	3, 29, 30
Dincher v. Marlin Firearms Co., 198 F.2d 821 (2d Cir. 1952)	8
Dobbins v. Terrazo Mach. & Supply Co., No. B-7122 (Davidson County Cir. Ct., Oct. 21, 1971)	37
Estes v. Kyle, 19 Tenn. 34 (1838)	18, 19
Flynn v. Camp, 470 S.W.2d 347 (Tenn. 1971)	11, 37
Frazier v. Elmore, 180 Tenn. 232, 173 S.W.2d 563 (1943)	32
Gassaway v. Hopkins, 38 Tenn. 583 (1858)	19
Grannis v. Ordean, 234 U.S. 385 (1914)	12, 13
Harts v. Tennessee Liquified Gas Corp, 2 Tenn. App. Bull. 207 (Ct. App. 1971)	7
Henry v. Mississippi, 379 U.S. 443 (1965)	3, 31
Hodge v. Service Mach. Co., 438 F.2d 347 (6th Cir. 1970)	7, 11
Hubbard v. Epps, 68 Tenn. 231 (1877)	19
Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482, cert. denied, 396 U.S. 942 (1969)	passim

Kempe v. Bader, 86 Tenn. 189 (1887). 19

Knox v. Batson, 217 Tenn. 620, 399 S.W.2d 765 (1966). 34

Lamb v. Powder River Live Stock Co., 134 F. 434 (8th Cir. 1944) 22

Langford v. Vanderbilt Univ., 199 Tenn. 389, 287 S.W.2d 32 (1956). 32

Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970). 10

Lerner v. Casey, 357 U.S. 468 (1958) 30

Marcus v. Search Warrants, 367 U.S. 717 (1961) 30

McDaniel v. Mulvihill, 196 Tenn. 41, 263 S.W.2d 75 (1953). 19

Missouri v. Lewis, 101 U.S. 22 (1880). 25, 26

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12, 14, 17, 22

NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958) 3, 31

Parker v. North Carolina, 397 U.S. 790 (1970). 33

Peebles v. Green, 74 Tenn. 471 (1880). 19

Rives v. International Oil Burner Corp., 298 F. Supp. 1146 (E.D. Tenn. 1969) 28

Shapiro v. Thompson, 394 U.S. 618 (1969) 23, 25

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). . . . . passim

Terry v. Anderson, 95 Tenn. 628 (1877) 21, 36

Truax v. Corrigan, 257 U.S. 312 (1921) 25

Vason v. Nickey, 438 F.2d 242 (6th Cir. 1970). 7, 11

Williams v. Georgia, 349 U.S. 375 (1955) 3, 33, 35

Zucht v. King, 260 U.S. 174 (1922) 30

Statutory Authorities

Page

U.S. CONST. amend. XIV . . . . . passim

Judicial Code § 1257(2), 28 U.S.C. § 1257(2) 2, 29, 30

TENN. CODE ANN. § 28-304 . . . . . passim

Tenn. Acts 1969, ch. 293 . . . . . 37, 38

TENN. SUP. CT. R. 14(4) 3, 7, 30, 32

TENN. SUP. CT. R. 32 34

TENN. CT. APP. R. 124(4) 3, 31

Other Authority

RESTATEMENT OF CONFLICTS OF LAW §§ 603, 604 (1934) 19

RESTATEMENT (SECOND) OF TORTS § 402A (1966) 36

Annot., Noncompliance with State Procedural Rule as Constituting "Adequate State Ground" for Denial of Relief so as to Preclude Supreme Court Review of Federal Questions, 24 L. Ed. 2d 837 (1970) 35

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1971.

NO. .....

J. W. HARGROVE, PLAINTIFF-APPELLANT,

-vs-

C. L. NEWSOME, et al., DEFENDANT-APPELLEES.

On Appeal from the Supreme Court of Tennessee

JURISDICTIONAL STATEMENT

J. W. Hargrove, the appellant here and the plaintiff below, respectfully prays that this Court note probable jurisdiction of its appeal seeking review of the judgment of the Supreme Court of Tennessee entered in this case on September 7, 1971.

OPINION BELOW

The initial and supplementary opinions of the Supreme Court of Tennessee are reported at 470 S.W.2d 348, but are as yet unreported in the official reports of the Supreme Court of Tennessee. The opinion denying the plaintiff's petition for rehearing is unpublished. All three opinions are set forth in the Appendix.

This proceeding originated as an action in the Circuit Court for Davidson County, Tennessee. It was a products liability action in which the plaintiff, the appellant here, sought to recover for personal injuries received from a defective mechanical dock. The trial court dismissed the action as barred by the statute of limitations on July 17, 1970. On appeal this dismissal was affirmed on June 7, 1971. On September 7, 1971, a petition for rehearing was denied and judgment entered by the Supreme Court of Tennessee. Timely notice of appeal to this Court was filed in the Supreme Court of Tennessee on December 2, 1971.

The Supreme Court of Tennessee entered its judgment on September 7, 1971. Its initial and supplemental opinions had been filed on June 7, 1971 but because the plaintiff had immediately petitioned the state court for a rehearing, the judgment was entered at that time but did not become final until disposition of the rehearing petition. The petition for rehearing was denied, and judgment was entered on September 7, 1971.

Jurisdiction of this Court is invoked pursuant to section 1257(2) of the Judicial Code [28 U.S.C. § 1257(2)] this being an appeal which draws into question the validity of T.C.A. § 28-304, on the ground that it is repugnant to the Constitution of the United States.

As the Supreme Court of Tennessee applied TENN. CODE ANN. § 28-304, the general statute of limitations, to bar an

action before injury had occurred in spite of the appellant's assertion that such application was unconstitutional, this matter is appropriately brought to this Court by appeal. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

Nor is there an adequate state ground. The Tennessee Supreme Court cited its rule, TENN.SUP.CT.R. 14(4), in overruling the plaintiff's constitutional arguments. Certainly this is a procedural state ground as opposed to a substantive state ground so that the jurisdiction of this Court is not brought into question. Henry v. Mississippi, 379 U.S. 443 (1965). Evenso, this state procedural rule does not on its face apply to provide state grounds for denying the plaintiff's constitutional claim and no reported case has been found where the Tennessee appellate courts in overruling a demurrer applied the cited rule or the analogous rule of the state Court of Appeals, TENN. CT. APP. R. 12(4). At best, the Tennessee Supreme Court's dismissal was discretionary; at worst, it was novel. In either case, the reference to rule 14(4) is not an adequate state ground. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review.") and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) ("[A] rule, more properly deemed discretionary than jurisdictional, does not bar review."). Moreover, the federal question was timely. Williams v. Georgia, 349 U.S. 375 (1955); Sullivan v. Little Hunting Park, supra.

In the event that the Court does not consider appeal the proper mode of review, the appellant requests that the

942 (1969) . . . . . passim

upon as a petition for writ of certiorari pursuant to Section 2103 of the Judicial Code [28 U.S.C. § 2103].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fourteenth amendment to the Constitution of the United States.

This case also involves TENN. CODE ANN. § 28-304, as it existed prior to May 16, 1969, which states:

> Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.
>
> TENN. CODE ANN. § 28-304.

QUESTIONS PRESENTED

This appeal deals with the constitutionality of Tennessee's statute of limitations as applied to the present case, to bar the plaintiff's action before he was injured. In Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482, cert. denied, 396 U.S. 942 (1969) and its progeny, the state Supreme Court has held that in products liability actions, the one-year limitation for personal injuries, TENN. CODE ANN. § 28-304, runs from the time of sale, not from the time of injury. In the present case the state Supreme Court disregarded prior decisions of intermediate state court and the federal

diversity courts to hold that Jackson's time-of-sale principle applied.

The present case is a products liability action arising out of injuries received by the plaintiff in an industrial accident caused by a defective mechanical dock. Because the dock had been purchased over fourteen months before the accident, the state courts held that Jackson barred suit by the plaintiff over two months before the injury occurred.

Thus, the questions presented are:

1. Whether Tennessee's one-year personal injury limitation running from the time of sale is so short that it denies plaintiffs a reasonable opportunity to be heard and to present claims recognized by state law to be valid, thus violating the due process clause;

2. Whether the principle Jackson decision singles out a class for denial to them of access to the courts without the justification of a compelling governmental interest in contravention of equal protection of the laws guaranteed by the fourteenth amendment.

STATEMENT OF THE CASE

The Facts.

This is a products liability action for $60,000 for personal injuries suffered by the plaintiff, J. W. Hargrove, in an industrial accident on September 22, 1967. The accident

was caused by a defect in a mechanical dock purchased by the plaintiff's employer, the Schroeder Division of Scoville Manufactoring Company located in Dickson, Tennessee, from defendant, W. L. Newsome, doing business as Materials Handling Service. The date of sale was July 8, 1966. The ramp was manufactured by defendant, Kelley Company, and distributed through Newsome.

The accident occurred when the plaintiff-employee was operating a mobile fork lift in the course of his employment. He drove the fork lift into the mechanical dock. A defect in the functioning of the dock caused the dock to incline at a steep angle throwing the fork lift, with the plaintiff on it, backwards to the ground level four feet below. The lift rolled over in mid-air, landing on top of the plaintiff and severely injuring him.

Trial Court Proceedings.

On September 20, 1969, the plaintiff filed suit in circuit court against these defendants, the dock manufacturer and its selling agent, alleging diversity and seeking damages for his injuries. At the time of filing, two years and two months had elapsed since the sale of the defective products. The injury occurred within one year of the filing.

The declaration alleged negligence, strict liability, and breach of warranty. The defendants demurred, contending the action was barred by Tennessee's general personal injury limitation, TENN. CODE ANN. § 28-304, and that the warranty counts should be dismissed for lack of privity of contract.

The circuit court held that because more than one year had elapsed prior to the initial filing, Jackson required the dismissal of the negligence and strict liability counts; lack of privity barred the warranty count.

Proceedings in the State Supreme Court.

On appeal to the Supreme Court of Tennessee the plaintiff argued, in addition to advocating the abolition of the privity requirement in warranty actions, that the limitation period could not begin to run until some injury "however slight" was incurred by the plaintiff. In the Tennessee Court's initial opinion the limitations issue, even though raised, was ignored; the Court simply reversed its trend toward the abolition of the no-privity defense.

In a supplemental opinion the state Supreme Court overruled the decisions of its intermediate court in Harts v. Tennessee Liquified Gas Corp., 2 Tenn. App. Bull. 207 (Ct. App. 1971); and the federal diversity courts in Hodge v. Service Mach. Co., 438 F.2d 376 (6th Cir. 1970); Vason v. Nickey, 438 F.2d 242 (6th Cir. 1970).

Hargrove immediately petitioned for a rehearing raising two new authorities: the state workman's compensation limitation, and the fourteenth amendment of the federal Constitution. On September 7, the state court denied the rehearing and entered judgment, stating that TENN. SUP. CT. R. 14(4) justified denial of the additional questions. From this judgment the plaintiff appeals to this Court.

WHY THE QUESTIONS ARE SUBSTANTIAL

This case arises out of injuries suffered by J. W. Hargrove because of a defect in a fourteen-month-old machine. The district court applying Tennessee's general personal-injury limitation held that the action became time-barred two months before the injury occurred. Hargrove has been denied any right to present his claim to the courts even though he has a valid right of action.

A limitation rule which bars recovery for injuries before they occur is manifestly unfair and irrational. It brings to mind the brand of justice dispensed by Lewis Carroll's Queen of Hearts. Judge Jerome Frank, dissenting in Dincher v. Marlin Firearms Co., 198 F.2d 821 (2d Cir. 1952) pointed out the anomaly of a pre-injury time-bar.

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff . . .
>
> As the Connecticut Supreme Court has said, the policy behind a limitations statute is that of penalizing one who "sleep[s] upon his rights." But no student of such legal somnolence has ever explained how a man can sleep on a right he does not have.
>
> 198 F.2d at 823.

J. W. Hargrove did not sleep on his rights. He did not delay unnecessarily in bringing his action. Even under

Tennessee law, his rights are still alive. The law of Tennessee still recognizes Hargrove's right of action provided he can find a forum to present his claim. The most rudimentary notion of justice demands that Tennessee allow Hargrove a meaningful and appropriate hearing for a recognized claim. This notion is embedded in the federal Constitution.

The question is whether the courts of Tennessee can, while recognizing an established right of action, close their doors to hear such claims before the transaction creating the action transpires. What more fundamental right can there be than the right to bring a claim into the courts for determination on the merits? Without that privilege all other legal rights become useless gestures, judicial principles devolve into empty axioms, and legal thought deteriorates into a meaningless metaphysics without connection with the real world.

The issue is not whether Tennessee law recognizes products liability torts. It does. The issue is the right of access to the courts, the right to a hearing on the merits. This right is fundamental to the due process of law guaranteed by the federal Constitution.

PART ONE: THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. STATE LAW BACKGROUND: THE JACKSON RULE REQUIRES PRODUCTS LIABILITY CLAIMS TO BE FILED WITHIN ONE YEAR OF SALE EVEN THOUGH THE INJURIES COMPLAINED OF OFTEN OCCUR AFTER THAT TIME.

Jackson v. General Motors Corp., 223 Tenn. 12, 441 S.W.2d 482, cert. denied, 396 U.S. 942 (1969), is at the

core of this lawsuit. It was a products liability action for personal injuries which allegedly occurred when a defect in the brakes of the Jackson's car caused it to suddenly roll backward down their sloping driveway, striking and injuring Mrs. Jackson. The car, purchased before the Uniform Commercial Code became effective in 1962, was two and a half years old at the time of the accident.

Subsequently the Jacksons sued for these injuries, pleading negligence, warranties, and misrepresentation. The Tennessee Supreme Court, however, dismissed the action. All counts were barred by the general personal-injury limitation, TENN. CODE ANN. § 28-304, because the Tennessee Court held that in products liability actions the limitation period began running at the time of sale, not the time of injury.

The Tennessee Court has followed Jackson in a subsequent line of cases. In Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970), the state Supreme Court reaffirmed Jackson's time-of-sale principle in dismissing the plaintiff's negligence and strict tort liability counts. Unlike the product in Jackson, the Layman product was purchased subsequent to the effective date of the Uniform Commercial Code. Because the UCC contains a specific limitation for warranty actions thereunder, the Layman decision allowed the plaintiff to proceed on his warranty count.

In Bates v. Shapard, 461 S.W.2d 946 (Tenn. 1970), handed down the day on which the present case was argued, the Court again denied recovery against the manufacturer of an allegedly

defective automobile on limitations grounds even though the plaintiff, the car owner's girl friend (and by the time of his filing, his wife) had no legal interest in the automobile at the time of the accident. Warranty recovery was allowed against the automobile dealer!

Finally in Flynn v. Camp, 470 S.W.2d 347 (Tenn. 1971), handed down the same day as the present case, the Tennessee Court held that the amendatory act passed by the legislature even before the Jackson decision became final, was ineffective to save an action for a defective product sold before the amendment's effective date.

None of the Jackson line of cases however involved injuries to plaintiffs with no legal remedy at all until their injury until the present case. In this case an employee injured by a defective mechanical dock sought recovery for his injuries. Despite prior indications that it might rule otherwise for UCC products, the state Supreme Court reiterated the privity requirement for warranty actions and refused to allow an employee to maintain an action for injuries suffered in the course of employment from his employer's equipment.

In a supplemental opinion the state Court also refused to accept this Court's holdings in Vason v. Nickey, 438 F.2d 242 (6th Cir. 1970) and in the first appeal in Hodge v. Service Machine Co., 438 F.2d 347 (6th Cir. 1970), in which it was decided that some "legally cognizable damage,"

however slight, was necessary to commence the Jackson limitation.

Finally in its third opinion, an unpublished denial of a rehearing, the state Supreme Court made it clear that for procedural reasons it had not considered the merits of the plaintiff's constitutional arguments.

The Tennessee Supreme Court dismissed the present action by applying Jackson's time-of-sale rule even though the plaintiff incurred no "legally cognizable damage" until he was injured. The state court erred in holding that Jackson v. General Motors and the rule espoused in that case were constitutional: First, the Jackson case denies plaintiffs due process of law by construing a statute of limitations for products liability actions in such a manner that it precludes a reasonable opportunity to present their claims to the courts. Second, it denies them equal protection because it differentiates among claimants in granting fundamental constitutional interest, the right of access to the courts, without the justification of a compelling governmental interest.

II. THE PRINCIPLE OF JACKSON V. GENERAL MOTORS DENIES PLAINTIFFS PROCEDURAL DUE PROCESS BY FAILING TO AFFORD THEM A REASONABLE OPPORTUNITY TO PRESENT VALID CLAIMS.

The due process clause has always required that parties to a lawsuit be afforded a full and reasonable opportunity to present their case to the courts for adjudication. As the Supreme Court stated in Grannis v. Ordean, 234 U.S. 385 (1914),

> The fundamental requisite of due process of law is the opportunity to be heard.
>
> 234 U.S. at 394.

In Commencing the statutory limitation period at the time of sale and in limiting actions to those brought within one year of the time of sale, Jackson denied J. W. Hargrove the right to bring this action because he was hurt fourteen months after the sale. The Jackson limitation is thus unconstitutional.

A. Due Process Requires that Parties be Given a Full and Reasonable Opportunity to Present Claims.

Perhaps the most fundamental right espoused in the phrase "due process of law" is the opportunity of those interested in litigation to make appearance and present facts relevant to the issues to the tribunal charged with adjudication of the interest involved.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) the federal Supreme Court reiterated the requirement of a full opportunity for a hearing in reexamining the constitutionality of the notice provisions of a New York act allowing known defendants in trust distribution actions to be notified of the action by publication. Because the notice provisions of the act did not provide the best opportunity reasonably possible for the trust beneficiaries to make their appearance, it was unconstitutional. The due process clause necessarily implies the reasonable opportunity for a full and fair hearing.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case.
>
> 339 U.S. at 313.

The Mullane Court thus recognized as a general proposition the following corollary to the due process clause: Every party to litigation must be afforded a reasonable opportunity for a full and fair hearing on their merits.

Due process requires more than a perfunctory hearing; the required hearing must be "meaningful." In Armstrong v. Manzo, 380 U.S. 545 (1965), a child's natural father was not given notice of adoption proceedings whereby he was deprived of the parenthood of his child. The lack of notice was justified under state law by an ex parte finding of nonsupport. When he sought to set aside the adoption decree the trial court held that he had not sustained the burden of proof, a burden which he would not have born at the earlier hearing. The Supreme Court reversed, holding that the shift of the burden was impermissible. Delaying the natural father's opportunity to be heard until the burden had shifted against him was to deny him an "opportunity [to be heard] at a meaningful time and in a meaningful manner." 308 U.S. at 552 (Emphasis added.) Certainly holding that Hargrove must file suit before he is injured is to fail to provide an opportunity for a hearing which is meaningful in time.

Plaintiffs, as well as defendants, are entitled to the constitutionally guaranteed opportunity for a hearing. In Boddie v. Connecticut, supra, 401 U.S. 371, the Court refused to allow Connecticut to charge an indigent prepaid court cost in a divorce action on the ground that such a charge would effectively deny him access to the divorce courts. Admittedly Connecticut might severely limit the available grounds for divorce or perhaps altogether deny it, but Connecticut cannot deny court access to a plaintiff alleging a valid claim.

Finally, Bell v. Burson, 402 U.S. 535 (1971) applied the requirement of an opportunity to be heard in a driver's license suspension proceedings. Even though a driver's license is a mere privilege, not a right, it is an "important interest" subject to procedural due process. The Hearing Corollary requires a determination of fault in suspension proceeding because the federal Court's analysis of state law showed the fault was a material issue.

This Court's holdings in this area ring crystal clear. At the very least, due process requires that a state provide a reasonable opportunity for a hearing "at a meaningful time" before its action can alter any "important interest," whether the interest is the right to drive on public roads, the right to obtain a divorce, or the right to recover damages for personal injuries caused by a defectively manufactured product.

B. The Jackson Rule Does Not Allow Plaintiffs a Hearing on the Material Issues of their Claims.

The limitations rule of Jackson v. General Motors fails to satisfy due process of law because it does not allow plaintiffs a reasonable time within which to present their claims, hence violating the right to a hearing guaranteed by the due process clause. Analysis of state law in the manner followed by this Court in Bell v. Burson, supra, 402 U.S. 535, shows that the present plaintiff was prevented from having any opportunity at all for a hearing on his claim.

The Burson case first analyzed state law to determine which issues are material. The Court then examined the state procedures to determine if the hearing opportunity afforded was "meaningful" and "appropriate."

In the Burson case, this Court analyzed the Georgia license-suspension procedure carefully to determine whether they were sufficient to provide Mr. Burson with an opportunity for a full hearing which was "meaningful" and "appropriate to the nature of the case." The Court concluded Georgia had deprived Mr. Burson due process by refusing to allow him to present evidence that a judgment could not be rendered against him in a proceeding where the only purpose of the proceeding was to secure such judgments. Georgia had no interest in protecting claimants of unrecoverable judgments.

Georgia's primary argument contended that fault and liability was irrelevant to its statutory scheme; hence, a

hearing on the fault issues was unnecessary: But an analysis by the federal Court showed conclusively that Georgia law of accident reparation was fault-oriented.

> Thus, we are not dealing with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license, the State may not consistently with due process eliminate consideration of that factor in its prior hearing.
>
> 402 U.S. at 541.

In the present case we are not dealing with a statutory scheme whereby a state grants a right for only a limited time. The state-law scheme allows Hargrove a right of action; it simply denies him a forum within which to bring such action.

After examining state law to determine the material issue, the Burson Court then analyzed the state's procedural mechanics to determine whether the procedural scheme provided a "meaningful" hearing "appropriate to the nature of the case" within the meaning of those criteria as stated in Armstrong v. Manzo, supra, 380 U.S. at 552, and Mullane v. Hanover Bank, supra, 339 U.S. at 313. The Court's conclusion was that the Georgia provision for hearing opportunity failed to meet the due-process standard.

> It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.
>
> 402 U.S. at 542.

Under Bell v. Burson, due process and its opportunity-for-hearing corollary require that state procedure allow any

person with an "important interest" in litigation be given an opportunity to present any evidence relevant to issues which under state law are material to the determination of the interest. As we shall see, under this test, the Jackson rule fails miserably; without denying the Hargrove's substantive right of action, Jackson v. General Motors, when applied to the present case, completely withdraws from the plaintiff the right to present evidence to establish his claim.

A Burson analysis of the state law shows that, notwithstanding the limitations bar, the plaintiff's claim remains valid. The issues material to the plaintiff's claim remain the same after the limitation as before.

The first step in the Supreme Court's analysis in Bell v. Burson, supra, 402 U.S. 535, is an examination of the state law to ascertain the material elements of the claim.

In the present situation such an examination shows that the elements are the same, both before and after the limitation bars the action, because the Jackson time-bar does not in any way affect the plaintiff's substantive right. Under state law the limitation bars the remedy not the right. The common law has always regarded the question of limitations as affecting only the remedy and not the underlying substantive right. As early as Estes v. Kyle, 19 Tenn. 34 (1938) the Tennessee Court said:

> With regard to the statutes of limitations especially, there can be no doubt ... they are strictly questions

affecting the remedy, and not questions upon the merits.

19 Tenn. at 41.

This statement has been followed by the Tennessee courts in an unbroken line of cases since that time to justify application of local limitations to foreign claims. Barbour v. Erwin, 82 Tenn. 716, 720 (1885); McDaniel v. Mulvihill, 196 Tenn. 41, 44, 263 S.W.2d 75 (1953). See also Kempe v. Bader, 86 Tenn. 189 (1887); Peebles v. Green, 74 Tenn. 471 (1880); Hubbard v. Epps, 68 Tenn. 231 (1877); Gassaway v. Hopkins, 38 Tenn. 583 (1858). Compare RESTATEMENT OF CONFLICTS OF LAW §§ 603, 604 (1934).

In the most recent of these cases, McDaniel v. Mulvihill, 196 Tenn. 41, 236 S.W.2d 75 (1953), an action based on the Mississippi Wrongful Death Act was brought in the Tennessee courts. The Mississippi Death Act provided for no limitation period but instead incorporated that state's general limitation statute which allowed six years within which to bring a death action. The trial court dismissed the case and the Tennessee Court upheld the dismissal on the ground that while Mississippi law established the right of action, the Tennessee limitation law barred the remedy.

Similarly, the limitation bar of the Jackson rule bars the remedy afforded by the Tennessee court, but not the right of action. The plaintiff, without a doubt, is entitled to relief if he is allowed to prove the facts alleged in the complaint. In essence, Tennessee has created a right of action but has denied the plaintiff any reasonable opportunity to enforce that right of action.

Thus even while dismissing Hargrove's action, it is clear that Tennessee law recognizes that Hargrove has a right of action for his products liability injury. Yet under the state limitation law he is precluded from the right to prove his right of action and to obtain a judgment. He is simply barred from any remedy to enforce such right. He is not given the reasonable opportunity to be heard required by procedural due process.

Analysis of the hearing afforded the plaintiff shows that it fails miserably to measure up to the standards of meaningfulness and appropriateness announced in Burson.

The second step in the Burson analysis is to determine whether the state procedures allowed the plaintiff the opportunity to present evidence on each material issue.

Due process requires that the plaintiff have a reasonable opportunity to present his claim, including a reasonable time within which to present it. Armstrong v. Manzo, supra, 380 U.S. 545, was clear.

> A fundamental requirement of due process is "the opportunity to be heard." It is an opportunity which must be granted at a meaningful time and in a meaningful manner.
>
> 380 U.S. at 552. (Emphasis added.)

In Armstrong, the petitioner was notified of the pendency of the action only after the judgment had been entered. The Supreme Court struck the late notice saying that it was too late to be at a "meaningful time" in the proceedings.

A hearing at a "meaningful time" is a hearing in which the parties have adequate notice and sufficient time to prepare, attend, and present their hearing. Under Armstrong a party may not be denied an opportunity to present evidence until after his rights have been altered. Indeed, in Armstrong v. Manzo the petitioner was at least allowed an opportunity to challenge the change in his rights; in the present case Hargrove received no such opportunity, the time-bar was irrevocable.

J. W. Hargrove was barred even before he was injured. The Burson court declared that the proposition that the claimant be given a reasonable opportunity to present evidence on each material element of the claim "hardly seems to need explication." A fortiorari, the denial to Hargrove of any right at all to present any evidence is indubitably a denial of the right to a hearing granted by the due process clause.

C. This Court Has Long Held that Due Process Requires Reasonable Limitation Periods.

We have shown the development of the opportunity corollary in the context of recent Supreme Court decisions. While only one aspect of the right to an opportunity for a fair hearing is the problem of excessively short limitation period, it has long been firmly established that unreasonably short limitation periods are contrary to due process of law. For example, in Terry v. Anderson, 95 U.S. 628 (1877), the Supreme Court approved a limitation statute barring civil war claims but only because "a reasonable time is given ... before the bar takes effect.". 95 U.S. at 633.

In In re Brown, 135 U.S. 662, 701, 708 (1890) this Court refused to allow Virginia to place a one-year limitation on the enforcement of certain bonds issued by that state because the bondholders were widely scattered and many of them would not receive notice of the limitation in time to make arrangements to bring the action.

See also Lamb v. Powder River Live Stock Co., 134 F. 434, 439 (8th Cir. 1904) ("A reasonable time ... must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate.").

D. Because Jackson's limitation is so short [redacted] it denies a reasonable opportunity to be heard, it is a denial of due process.

J. W. Hargrove is entitled to a reversal of the judgment below. In Mullane v. Hanover Bank, supra, 339 U.S. 306; Armstrong v. Manzo, supra, 380 U.S. 545; Boddie v. Connecticut, supra, 401 U.S. 371; and Bell v. Burson, supra, 402 U.S. 535, the federal Supreme Court has made manifestly clear its firm intention to require unfaltering adherence to the opportunity-for-hearing corollary. Every person is entitled to a reasonable opportunity for a hearing on a material issue. An analysis of state law shows that the issues material to Hargrove's claims are the same after the limitation ran as before, but because of the Jackson rule, Hargrove was never given a reasonable opportunity to present these claims. The most rudimen-

tary concepts of due process demand such an opportunity to be given Hargrove.

III. THE JACKSON RULE DISTINGUISHES BETWEEN THOSE PERSONS ENTITLED TO THE FUNDAMENTAL CONSTITUTIONAL INTEREST OF ACCESS TO THE COURTS WITHOUT BEING JUSTIFIED BY A COMPELLING STATE INTEREST; HENCE IT DENIES EQUAL PROTECTION OF THE LAWS.

Judicial review under the equal protection clause is made in two levels: At a minimum the clause requires that every classification have a reasonable relation to the objectives of the classification. But beyond this minimum requirement, a state's classification limiting the exercise of constitutional rights, such as the right of access to the courts, may be justified only if there is a countervailing "compelling governmental interest" requiring such classification.

Because the plaintiff is denied access to the courts, certainly a fundamental constitutional right, while others similarly situated are allowed to sue, and because there is no compelling governmental interest to justify such a distinction, the use of the statute of limitations to bar them from access to the courts for their personal injuries is a denial to them of equal protection of the laws.

A. Equal Protection Clause Requires a Compelling State Interest to Justify Discrimination Against the Exercise of a Fundamental Constitutional Interest.

The Jackson rule completely excludes the plaintiffs from the courts of Tennessee without any compelling governmental

interest. Because access to the courts is a constitutional right, a mere showing of rational relationship between the classification and its objectives is insufficient. A "compelling governmental interest" is necessary to surmount the requirements of the equal protection clause.

Under Jackson the class of plaintiffs who in dealing with a product manage not to be injured until the product is one year old is completely barred from access to the courts. On the other hand, those plaintiffs who do not avoid injury for such a period are allowed to maintain an action. This differentiation, which is made without the justification of a compelling interest, is impermissible under the equal protection clause.

The "compelling interest" test was clearly stated in Shapiro v. Thompson, 394 U.S. 618 (1969). In that case the Supreme Court reviewed the constitutionality of Connecticut's one-year residency requirement imposed as a prerequisite to welfare payments. Finding that such a requirement penalized the constitutional right to free travel, the Court refused to listen to the state's argument that the requirement was reasonably related to proper state interest. A more stringent requirement was imposed by the Court to justify any classification imposing upon constitutional rights.

> [A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a compelling governmental interest is unconstitutional.

394 U.S. at 634 (Emphasis in

Since access to the courts is indisputably a constitutional right, any limitation upon that right imposed upon any class of plaintiffs violates the equal protection clause unless justified by a compelling state interest.

B. Access to the Courts is Indubitably a Fundamental Constitutional Right Entitled to the Maximum Protection of the Equal Protection Clause.

Indeed, the most fundamental of constitutional rights is access to the courts. Without such access other rights, constitutional or nonconstitutional, are unenforceable. In Truax v. Corrigan, 257 U.S. 312 (1921) the Supreme Court struck down an exception to the general Arizona injunction statute prohibiting the injunctions for labor disputes. The Court held that the equality provision of the fourteenth amendment required equality of access to the courts.

> [T]hey should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts ...
>
> 257 U.S. at 335. (Original in italics.)

In Missouri v. Lewis, 101 U.S. 22 (1880) the federal Supreme Court, while approving territorial differences in judicial procedure, did so only with the express proviso that the access to the courts be denied to none.

> The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions, have an equal right

> in like cases, and under like circumstances, to resort to them for redress.
>
> 101 U.S. at 30.

Because the present plaintiff has been denied equal access to the courts for the redress of his wrongs, without the justification of any "compelling governmental interest," he has been denied equal protection.

The Jackson rule is simply a procedural exclusion of the plaintiffs from the courts of Tennessee, not based on any substantive state law. The Jackson time-bar of 28-314 in no way restricts the plaintiff's right of action if he can find a forum in which to assert such action; Jackson only bars the remedy in the Tennessee courts, not the right. Tennessee clearly recognizes the plaintiff's right of action as independent from the general personal-injury limitation, TENN. CODE ANN. § 28-304. Because section 28-304 is a part of the state's general statute of limitations, it bars only the remedy and not the plaintiff's right of action. The limitations defense does not substantively affect the plaintiff's right to bring the present action or limit the defendants' liability; it simply closes the doors of courts of the State of Tennessee to the assertion of the action. Thus it is clear that Tennessee's use of the Jackson limitation is in no way a refusal of the state to recognize the plaintiff's right of action for substantive reasons. It is simply the blatant denial to the plaintiff of the constitutional right of access to the courts.

C. Tennessee Has No Compelling Interest in Its Differentiation Among Those Entitled to Sue.

Of course Tennessee has no "compelling governmental interest" to justify the denial of access to its courts to the present plaintiff. Indeed so compelling is the state interest requiring this holding that in the overwhelming majority of jurisdictions the statute of limitations runs from the date of injury in product liability cases, at least insofar as the negligence counts are concerned.

This is not to argue that statutes of limitation are unconstitutional because they by definition do distinguish between those allowed access to the court and those not allowed such access. The ordinary limitation provision is, however justified by compelling state interests: The state interest in avoiding state claims for which the evidence and the witnesses' memories of the incident have faded with time, and the state interest in promoting expedition in the disposition of disputes. Moreover, such limitation bars are avoidable by prompt filing.

While a state's governmental interest in ending litigation and preventing state claims may justify imposition of the ordinary and typical limitation requirements upon the plaintiff, the only discernable state interest in applying the Jackson rule is fairness to the defendant in allowing him to write off indefinite future liabilities for products after they are sold. This interest, however, can certainly not be

regarded as a "compelling governmental interest."

First. As we have seen, almost all other states use the injury rule and there is no allegation that the interest sought to be gained by Tennessee in the Jackson classification is unique to this state.

Second. In practice the Tennessee limitation does not even provide product write-offs for three reasons: (1) It only applies to products sold in the hiatus between Jackson and the legislature's immediate amendment. (2) Even for those products it provides no protection against out-of-state claims. (3) Under TENN. CODE ANN. § 28-107 Tennessee delays commencement of the limitation period in products liability actions brought by minors until the plaintiff achieves his majority. Rives v. International Oil Burner Corp., 298 F. Supp. 1146 (E.D. Tenn. 1969).

Third. With the exception of the Jackson line of cases, Tennessee has evinced no compulsion to adopt a time-of-sale rule: Both the pre-Jackson Tennessee law and the post-amendment limitations rule utilize the time-of-injury principle in commencing the limitation provision contrary to the Jackson rule. Because the Jackson principle is not a "compelling governmental interest," Tennessee cannot deny the plaintiff access to its courts without denying him equal protection of the law.

IV. THE NATURE OF THE CASE AND THE DECISIONS OF THIS COURT BRING THIS CASE WITHIN SECTION 1257(2).

Section 1257(2) provides the basis of this Court's jurisdiction in this appeal. It provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Gourt as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> Judicial Code § 1257(2).

Since the appellant raised constitutional objections to the use of the statute of limitations, TENN. CODE ANN. § 28-304, by the state court below but the limitation was applied over this objection, the only question concurring the applicability of section 1257(2) is whether Hargrove's constitutional challenge was directed at the "validity" of the state statute.

This question of whether the validity of the statute was attacked is brought about by the fact that the appellant does not challenge the general validity of TENN. CODE ANN. § 28-304. He only challenges the construction given that statute by the Tennessee Court in products liability cases. Such a challenge to a statute's application is sufficient, however, to bring the case within the ambit of section 1257(2).

In Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) this Court sustained an appeal even though the state

question. In their discretion they declined to do so.

statute complained was only challenged insofar as it burdened interstate commerce. The Dahnke doctrine is still viable today, having been applied in Marcus v. Search Warrants, 367 U.S. 717, 721 (1961) and Cohen v. California, 91 S.Ct. 1780, 1784 (1971).

Even though it is directed to the validity of T.C.A. § 28-304 only as applied to a class of cases and not its general validity, the present challenge to the state statute is not focused upon the weighing of evidence or the exercise of discretionary authority under the statute. Hence Lerner v. Casey, 357 U.S. 468 (1958) and Zucht v. King, 260 U.S. 174 (1922) do not apply. Because the state statute's application is entirely mechanical, the Dahnke doctrine affords review here on appeal.

V. REVIEW IN THIS COURT IS NOT PRECLUDED BY THE STATE PROCEDURAL GROUND.

The Tennessee Court relied on its rule 14(4) to dismiss the appellant's constitutional contentions. This discretionary rule provides that the state Supreme Court will not consider errors not presented at the trial level.

Because the application of that rule to the present case was novel, because its application in the present case was not justified, and because the rule is discretionary, it does not provide an adequate state ground for the judgment below. Because the present case went up on a demurrer without a trial and the pleadings properly presented the issues, rule 14(4) had no applicability. No Tennessee decision

has been found applying rule 14(4) of the state Supreme Court, or its analogue, rule 12(4) of the state Court of Appeals, on a demurrer or, more generally, to limit the theories presented to the appellate court on a well-developed factual record. Indeed, in Poss v. Dixie Sand & Gravel Co., 458 S.W.2d 625, 627 (Tenn. App. 1970), cert. denied, the Tennessee appellate court allowed appellate objection to trial court's jury charge given without exception. Such novelty in procedural requirement will not preclude review here. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Indeed, a procedural rule which limits the theories which may be presented in the appellate courts even though the factual record is sufficiently developed to clearly present to such courts the issue, is a procedure without a justifying state interest. Under Henry v. Mississippi, 379 U.S. 443 (1965) such a rule cannot be a state ground adequate to preclude review here.

But the most obvious reason that the procedural state ground is inadequate is that it was a discretionary rule. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 299 (1969), this Court refused to allow a discretionary procedural state ground to preclude review of federal questions in this Court.

> [The Virginia] decisions do not enable us to say that the Virginia court has so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented if the Supreme Court of Appeals desires to do so. See Henry v. Mississippi, 379 U.S. 443, [illegible], 85 S.Ct. [illegible], 571-573, 13 L.Ed.2d 408 (Black, J., dissenting). Such a rule, more properly deemed discretionary than

here by certiorari.

396 U.S. at 235.

Although Sullivan involved review on a writ of certiorari and the present case is an appeal, any distinction in the adequate state ground rule on certiorari and the rule on appeal is artificial and should be avoided.

The Tennessee procedural rule used below has long been recognized as completely discretionary insofar as constitutional questions are concerned. In Frazier v. Elmore, 180 Tenn. 232, 173 S.W.2d 563 (1943) the Tennessee Court said that:

> while it is true that the rules of this Court provide that all questions ... shall have been raised in the trial Court and relied on in the assignments of error, this limitation is not binding on this Court ... where the constitutionality of statutes is involved.
>
> 180 Tenn. at 242, 173 S.W.2d at 566.

The state court then went on to say that appellate courts have "broad discretionary powers" in dealing with such matters of practice." See also Langford v. Vanderbilt Univ., 199 Tenn. 389, 404, 287 S.W.2d 32 (1956). Thus it is clear that the use of rule 14(4) to dispose of a constitutional issue was discretionary.

Under Sullivan v. Little Hunting Park, supra, 396 U.S. 229, a discretionary state rule of procedure cannot be an adequate state ground to preclude review in the federal Supreme Court.

For substantial policy reasons grounded deeply in the federal nature of our system and the appellate jurisdiction of this Court, the presentation of federal questions to state courts has long been required as a prerequisite to review here. Cardinale v. Louisiana, 394 U.S. 437 (1969). Of course such questions must be raised in such a fashion that the state courts can consider the questions. Parker v. Illinois, 333 U.S. 571 (1948)

Under such considerations, it has been stated broadly that this Court will not consider questions not presented until rehearing. If under settled state procedure such delay precluded judicial review, these statements are correct. Compare Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). But if the state court exercised discretion in refusing to hear the federal question, the issue may be reached on appeal.

In Williams v. Georgia, 349 U.S. 375, 382-83 (1955) this Court made the distinction clear.

> A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. ... Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and

> deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right.
>
> 349 U.S. at 382-83.

The Court then noted that while such motions were "not favored," they could grant relief in "'exceptional' or 'extraordinary' cases"; thus the state court had discretion in the refusal of the federal claims. See also Sullivan v. Little Hunting Park, Inc., supra, 396 U.S. 229. See generally Annot, Noncompliance with State Procedural Rule as Constituting "Adequate State Ground" for Denial of Relief so as to Preclude Supreme Court Review of Federal Questions, 24 L. Ed. 2d 837, 845-49 (1970).

The Tennessee rehearing procedure is strikingly similar to that of Georgia in the Williams case. Certainly new issues can be raised at that stage; rule 32, ¶ 2 of the Tennessee Supreme Court specifies that the rehearing petition will be refused "where no new argument is made, and no new authority adduced." An example of the practice under this rule is found in Knox v. Batson, 217 Tenn. 620, 399 S.W.2d 765 (1966). In that case the Tennessee Supreme Court said that the rehearing petition should be used only if "some new and decisive authority has been discovered which was overlooked by this Court." 217 Tenn. at 641, 399 S.W.2d at 775. The state high court then discussed and distinguished the only new authority cited. Thus it is clear that the procedural rules and established practice of the Tennessee courts allowed consideration of the federal

Such discretion by the state court is not sufficient to preclude review here. Sullivan v. Little Hunting Park, Inc., supra, 396 U.S. 229, and Williams v. Georgia, supra, 349 U.S. 375. The Sullivan-Williams rule is consistent with the fundamental precepts of federalism and with the appellate function of the Court.

PART THREE: THE QUESTIONS REQUIRE PLENARY CONSIDERATION

The federal questions are not only substantial in the sense of Zucht v. King, supra, 260 U.S. 174; they are also substantial in the sense that they are important, so important that they require plenary consideration by this Court. Their importance stems from these significant areas: the broad principles involved, the precedent necessary to prevent injustice, and the present plaintiff's right to fair dealing in the presentation of his claim to the courts.

In the first place they are important because they involve the application of broad fundamental principles in the context of products liability cases, an expanding field of litigation. The fundamental principle involved is the right of access to the courts. As we have seen, there is no doubt as to the fundamental nature of the right of access to the courts. This Court has unfalteringly adhered to its holdings that due process requires a hearing on all material issues before a party's rights can be altered. Bell v. Burson, supra, 402 U.S. 535; Mullane v. Hanover Bank, supra,

339 U.S. 305; Armstrong v. Manzo, supra, 380 U.S. 545. Indeed the federal questions here presented are important in that the answer to these questions will reiterate in modern context the constitutional requirement of reasonable limitation periods found in Terry v. Anderson, supra, 95 U.S. 628; In re Brown, supra, 135 U.S. 701, and other older decisions of this Court, but which, while apparently still accepted by the Court, have not been reiterated in recent years.

The federal questions are important because they analyze the right of access to the Courts and the requirement of reasonable limitation periods in products liability cases, an area of the law which gains significance continually in our increasingly consumer-oriented society. Every state has now accepted the principle that manufacturers are liable in negligence regardless of privity and with the recent advent of RESTATEMENT (SECOND) OF TORTS § 402A (1966) and the abolition of warranty's privity requirement, the number of cases is continually increasing. Because the federal question involved here involves the right of access to the courts in such actions, they are extremely important.

The second area of importance in the federal questions here presented stems from the necessity of establishing a federal precedent to overrule the rule of Jackson v. General Motors, supra, 441 S.W.2d 482 which is being given such sway in Tennessee. Even though the legislature attempted to reverse Jackson, Tenn. Acts 1969, ch. 293, the Tennessee problem is apparently permanent for several reasons: First, the amendment applied

only to personal injuries, not property damage. Secondly, Flynn v. Camp, supra, 470 S.W.2d 347 applies the Jackson rule to post-amendment accidents caused by products sold prior to the amendment. And finally, the amendment may be invalid; one state court has held the anti-Jackson amendment is unconstitutional. Dobbins v. Terrazo Mach. & Supply Co., No. B-7122 (Davidson County Cir. Ct., Oct. 21, 1971). Furthermore, the Tennessee courts regard this Court alone as binding authority on federal questions, Brown v. State, 466 S.W.2d 527, 528 (Tenn. Crim. App. 1971); so this Court alone can establish a binding precedent. Thus, in addition to the broad policy reasons for the importance of the federal questions, Tennessee desperately needs the establishment of a federal precedent in this area.

The final reason for the importance of the federal questions here presented is the necessity of doing justice in the case at bar. As we noted in Part One, applying the limitation stated to Mr. Hargrove is indeed a denial to him of due process and equal protection. His right, as an individual litigant, to be given justice in his case is a matter of importance which also mandates plenary consideration of the present case.

Because of the necessity of justice in the present case, the need for a precedent for the Tennessee courts, and the significance of the broad policy issues involved, the federal questions are so important and substantial that they require plenary consideration by this Court.

CONCLUSION

For all the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM W. HALL
10 Arcade
Dickson, Tennessee 37055

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT
Oliver B. Dickins
Life & Casualty Tower
Nashville, Tennessee 37219

Attorneys for the Appellant.

TABLE OF CONTENTS

	Page
Initial Opinion	2
Supplemental Opinion	10
Judgment, June 7, 1971	12
Opinion on Petition to Rehear	13
Judgment, September 7, 1971	14

Appendix

FOR PUBLICATION

JUNE 7, 1971

J. W. HARGROVE,

Appellant

v.

W. L. NEWSOME, dba, MATERIALS HANDLING SERVICES and KELLEY COMPANY, INC.

Appellees

Davidson Law

Honorable Roy A. Miles, Judge

FILED
JUN 7 1971
RAMSEY LEATHERS
CLERK
SUPREME COURT

ATTORNEYS FOR APPELLANT:

William W. Hall,
Dickson, Tennessee

Oliver B. Dickins,
Gullett, Steele, Sanford, Robinson and Merritt
Nashville, Tennessee

ATTORNEYS FOR APPELLEES:

J. C. Summers,
Howser, Thomas, Summers & Dinkley
Nashville, Tennessee
For: W. L. Newsome, dba, Materials Handling Services

John K. Maddin, Jr.,
Gracey, Buck, Maddin & Cowan
Nashville, Tennessee
For: Kelley Company, Inc.

OPINION

This case comes to this Court from the action of the trial judge in sustaining demurrers filed in answer to the declaration, dismissing the suit. In this opinion the parties will be referred to as they appeared in the trial court: that is, J. W. Hargrove, as plaintiff, and W. L. Newsome, dba, Materials Handling Services, and Kelley Company, Inc., as defendants, or by name.

Appendix

Plaintiff is an employee of the Schrader Division of Scoville Manufacturing Company. On July 8, 1966, Schrader purchased a mechanical dock from the defendant Newsome, which dock was manufactured by the defendant Kelley. On September 22, 1967, plaintiff, while acting in the course of his employment with Schrader, was seriously injured due to an alleged malfunction of the mechanical dock. This suit was filed on September 16, 1968 against both defendants on the theory of (1) common law negligence, (2) express and implied warranty, and (3) strict liability sounding in tort.

The negligence and strict liability counts were dismissed as being barred by the one-year statute of limitations under T.C.A.§28-304 in effect prior to its amendment by Chapter 239, Public Acts of 1969. The warranty counts were dismissed for lack of privity of contract.

At this point we would like to express our appreciation for the help afforded this Court by the excellent briefs filed by counsel for all parties.

Counsel for plaintiff frankly and candidly admits under previous decisions of this Court the trial judge was correct in sustaining the demurrers. The thrust of the argument here is that the requirement of privity of contract in warranty actions is neither justified by past authority or by any public policy argument.

We agree as plaintiff argues the courts of several states feeling a need for a more satisfactory remedy in products liability cases for consumers injured by defective products to obtain redress generally against remote manufacturers accomplished this end by abolishing the requirement of privity of contract in warranty actions. In view of the Uniform Sales Act adopted in most jurisdictions various expedients have been used to circumvent the requirement of privity of contract; among them (1) the theory of third-party beneficiary contract, (2) agency theory, and (3) warranty running with the goods similar to a covenant running with the land. These methods and others have been praised by some writers and condemned by others. Be that as it may, it is not necessary for the decision in the case at bar for us to discuss the merits of these methods.

On this issue plaintiff cites as the landmark case Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960). In view of the more recent New Jersey cases of Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), and Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), it is likely true as stated in an article in Rutgers Law Review, Vol. 19, p. 693, that in New Jersey "privity has no vitality." In reading these three New Jersey cases it is difficult to determine whether they were decided upon the principle of strict liability in tort or upon the theory of implied warranty. Although the Uniform Sales Act and the more recent Uniform Commercial Code were both adopted

in New Jersey, the Uniform Commercial Code being effective January 1, 1963, these cases on the issue of privity give scant consideration to these statutes. These three cases and the Uniform Commercial Code are discussed in the above mentioned Rutgers Law Review.

On the theory plaintiff argues, particularly on the public policy argument, the case of Chapman v. Brown, 198 F.Supp. 78 (1961), affirmed 304 F.2d 149 (1962), is well reasoned. This case deals directly with the issue of privity and its relation to the Uniform Sales Act in a products liability case.

We have considered all the authority cited by plaintiff giving the reasons for the need of now abolishing privity of contract in warranty actions. Under the view we take of the matter it is not necessary to again list or discuss these reasons.

In products liability cases this Court has consistently required privity of contract in warranty actions. Kyker v. General Motors Corp., 214 Tenn. 521, 381 S.W.2d 884 (1964); Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967). The reasons and authority therefor are stated in these opinions. Plaintiff does cite the recent case of Layman v. Keller Ladders, Inc. ___ Tenn. ___, 455 S.W.2d 594 (1970), to support a statement that "In this case (Layman) this Court hinted that it recognized the need for abolishing vertical privity requirements at least among

members of the distributive chain." The only issue in Layman was the statute of limitations applicable to the facts of the case. Layman does not modify the holdings in Kyker and Olney.

We might well be persuaded by the arguments based on public policy in regard to the need for dispensing with the requirement of privity in warranty actions, except for one reason we consider controlling. Plaintiff had a remedy under either his count on negligence or under the count on strict liability in tort. The fact plaintiff under both these counts is unfortunately barred by a statute of limitations is not material to our decision since all civil actions are sooner or later barred by a statute of limitations.

It is next argued under the Uniform Commercial Code adopted in this state and made effective July 1, 1964, by enactment of Chapter 81, Public Acts of 1963, this Court should reconsider the requirement of privity in warranty actions. The events giving rise to Kyker v. General Motors, supra, and Olney v. Beaman, supra, occurred prior to adoption in this state of the Uniform Commercial Code and the point raised here in reference to this Code is of first impression in this State. The section of the Uniform Commercial Code pertinent to this issue is T.C.A.§47-2-318, which reads as follows:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or

> who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The effect of this statute is to abolish the requirement of privity of contract for personal injuries received under certain circumstances as to a member of the buyer's family, his household or a guest in his home in warranty actions brought against the buyer's immediate vendor. To this extent this statute changes the law in this state. The argument here is that this legislative change in our law should be extended to include all persons foreseeably affected by the products' defects, it being admitted plaintiff does not fall into any of the listed categories

The Uniform Commercial Code was written under the direction of the Permanent Editorial Board and recommended to the legislatures of the various states for passage on the ground it would make the law uniform in all states regarding commercial transactions covered by the Code. The value of the Code depends to a large measure on its uniformity, particularly as to the judicial construction courts give to the language used. This should inhibit courts from either extending or contracting the language used, particularly where the language as in T.C.A. §47-2-318, on the issue here, is clear containing no ambiguities.

During the time this Code was being written the issue of privity of contract in products liability cases was being discussed pro and con in opinions by a number of courts and also by various other legal scholars. In the preparation of Section 2-318 the issue of privity was considered. One version of this section (generally referred to as the Virginia-Wyoming version) which abolished privity of contract was considered by the Permanent Editorial Board and rejected. The legislatures of a number of states in adopting the Uniform Commercial Code modified Section 2-318, which modifications generally went further in abolishing the requirement of privity of contract than does Section 2-318 as recommended by the Permanent Editorial Board. We consider these facts pertinent since the Tennessee Legislature chose to adopt the version of Section 2-318 recommended by the Permanent Editorial Board.

In consideration of this matter we conclusively presume the Legislature at the time of its enactment of the Uniform Commercial Code had knowledge that under the law of this state privity of contract was required in warranty actions involving products liability cases. Further, the Legislature with this knowledge enacted T.C.A.§47-2-318, which does change the law as to privity of contract in warranty actions, but also clearly delineates the extent of the change. Under these circumstances to extend to any person not within the categories mentioned in the statute the right to bring an action upon warranty without privity of contract would, in effect, be

amending the statute under the guise of judicial construction.

This we should not do.

The judgment of the lower court is affirmed.

ROSS W. DYER,
Chief Justice

Chattin, Creson,
Humphreys, and
McCanless, JJ.
concur

After the above opinion had been prepared, considered and approved by the Court, plaintiff filed a supplemental brief directed to the counts of common law negligence and strict liability sounding in tort. Reply briefs have been filed and we have again considered the case as to these two counts.

The negligence and strict liability counts were dismissed on authority of Jackson v. General Motors Corporation, ___ Tenn. ___, 441 S.W.2d 482 (1969). In the supplemental brief plaintiff cites three recent cases arising out of the United States District Courts in Tennessee to support an argument that under the facts of the case at bar Jackson v. General Motors Corporation, supra, is not applicable. We have carefully considered the federal cases cited and are of the opinion Jackson v. General Motors Corporation, supra, is applicable to the case at bar. In Jackson v. General Motors Corporation, supra, we held the applicable statute, T.C.A. §28-304, (prior to amendment) commences to run at the date of the wrongful act or omission whether the damages occasioned were on the same date or later. In the case at bar the wrongful act or omission was occasioned on the date of the sale (July 8, 1966), and suit was not filed within one year from that date.

The Court was at the time of its consideration of Jackson v. General Motors Corporation, supra, and is now, fully aware that the decision in Jackson could and very likely would cause hardships in certain cases. The decision in Jackson was controlled by the decision in Albert v. Sherman, 167 Tenn. 133,

67 S.W.2d 140 (1934), and in both of these cases the Court was careful to point out the fact such hardships could result. Even so, during the thirty-four year period between Albert to Jackson the Legislature did not see fit to change the language of the statute at issue. Since Jackson, the Legislature has seen fit to make material changes in the statute.

Plaintiff also cites a recent opinion by the Court of Appeals styled Harts v. Tennessee Liquified Gas Corporation. This case is now in the appellate procedure and we do not deem it proper to comment on same at this time.

The judgment is affirmed.

ROSS W. DYER,
Chief Justice

SUPREME COURT, NASHVILLE

J. W. HARGROVE

Vs.

W. L. NEWSOME, d/b/a MATERIALS HANDLING SERVICES AND KELLEY CO., INC.

Davidson Law

Affirmed

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the Court below be affirmed and that the demurrers be sustained and the case dismissed.

All costs of the cause will be paid by J. W. Hargrove, for which let execution issue. 6/7/71.

J. W. HARGROVE,

Appellant

v.

W. L. NEWSOME, dba, MATERIALS HANDLING SERVICES and KELLEY COMPANY, INC.,

Appellees

Davidson Law

Honorable Roy A. Miles, Judge

OPINION ON PETITION TO REHEAR

Appellant, J. W. Hargrove, designated in the original opinion as plaintiff, has filed a courteous petition to rehear raising issues not litigated in the trial court. Under Rule 14(4), of this Court, issues not raised at the trial level cannot be litigated upon appeal.

The petition to rehear is denied.

ROSS W. DYER,
Chief Justice

Chattin, Creson, Humphreys, and McCanless, JJ. concur

J. W. HARGROVE

VS.

W. L. NEWSOME, d/b/a MATERIALS HANDLING SERVICES AND KELLEY CO., INC.

Davidson Law

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of petitioner. 9/7/71.

OFFICE OF THE CLERK FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the order denying petition to rehear of said Court, pronounced at its DECEMBER Term, 19 71, in the case of

J. W. HARGROVE

VS.

W. L. NEWSOME, d/b/a. etc., et al

as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Supreme Court Building at Nashville, on this, the 11TH day of NOVEMBER, 19 71.

Ramsey Leathers, Clerk

By _____, Deputy Clerk

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 13 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-746

J. W. HARGROVE,
Plaintiff-Appellant,

vs.

W. L. NEWSOM, et al.,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS APPEAL

JOHN K. MADDIN, JR.
GRACEY, BUCK, MADDIN & COWAN
500 Court Square Building
300 James Robertson Parkway
Nashville, Tennessee 37201
Attorneys for Defendant-Appellee, Kelley Co., Inc.

JAMES C. SUMMERS
HOWSER, THOMAS, SUMMERS & BINKLEY
300 Court Square Building
300 James Robertson Parkway
Nashville, Tennessee 37201
Attorneys for Defendant-Appellee, W. L. Newsom

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

Page

I. A "right to be heard" is not at issue in this case; at issue is the substantive rights, liabilities, and immunities of the respective parties .. 4

II. No substantial federal constitutional issue is presented by Tennessee's utilization of a date of sale related statute of limitations in products liability cases 5

Appendix A-1

TABLE OF AUTHORITIES

Decisions

Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934) 2, 12, 17

Allen v. Mottley Construction Co., 160 Va. 875, 170 S.E. 412 (1933) 16

Baldridge v. Toombs, 90 Ohio L. Abs. 425, 230 Ohio Op.2d 404, 189 N.E.2d 177 (1962) 11

Binkley v. Dow Chemical Co., Civil No. 4477 and 4478, U. S. Dist. Ct. for M. D. Tenn., filed September 24, 1971 ..... 6, 8, 14

Bodne v. Austin, 156 Tenn. 366, 2 SW2d 104 (1928) .. 12

Dincher v. Marlin Fire Arms Co., 198 F.2d 821 (2d Cir. 1952) 10

Erie v. Tompkins, 304 U.S. 64 (1938) 4, 5

Field v. Gazette Pub. Co., 187 Ark. 253, 59 S.W. 2d 19 (1933) 10

Flynn v. Camp, ... Tenn. ..., 470 S.W. 2d 347 (1971) 12

Goodall Company v. Sartain, 141 F. 2d 427 (6th Cir. 1944), cert. denied 323 U.S. 709 (1944) 12

Guaranty Trust Co. v. York, 326 U.S. 99 (1944) 4

Hall v. De Saussure, 41 Tenn. App. 572, 297 S.W.2d 81 (1956) 12

Hargraves v. Brackett Stripping Co., 317 F. Supp. 676 (E.D. Tenn. 1970) 14, 16

Hargrove v. Newsom, ... Tenn. ..., 470 S.W.2d 348 (1971) 3, 12

Henningston v. Bloomfield Motors, Inc., 32 N.J. 358, 151 A.2d 69 (1961) 13

Houston v. Florida-Georgia Television Co., Inc., 192 So.2d 540 (Ct. App., Fla. 1966) 10

Industrial Chrome Plating Co. v. North, 175 Or. 351, 153 P.2d 835 (1944) 12

Jackson v. General Motors, 223 Tenn. 12, 441 S.W. 2d 482 (1968), cert. denied 346 U.S. 942 (1969) 2, 10, 12, 16

Jewell v. Price, 264 N.C. 459, 143 S.E.2d 1 (1965) 11

Kitten v. George Washington Cemetery, Inc., 231 Md. 337, 180 A.2d 247 (1963) 11

Lamb v. Powder River Livestock Co., 132 F. 434 (8th Cir. 1944) 16

Land v. Neill Pontiac, Inc., 6 N.C. App. 197 (1969) .. 11

L. E. Talcott & Sons Inc. v. Aurora Corp., 176 F. Supp. 783 (D. Del. 1959) 10

Mathieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E. 2d 336 (1967) 11

Mendel v. Pittsburg Plate Glass Co., 25 N.Y. 2d 340, 253 N.E. 2d 207 (1969) 11, 14

Meyer v. Roth, 189 So.2d 515 (Ct. App. Fla. 1966) .. 10

Mickle v. Blackman, 252 So. C. 261, 166 S.E. 2d 173 (1969) 16

Middleton v. Texas Power and Light Co., 249 U.S. 152 (1919) 7

Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) 8
Morgan v. Schlanger, 374 F.2d 235 (4th Cir., 1967) .. 12

Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917) 11
Olson v. Passero, 402 S.W. 2d 953 (Ct. App., Texas 1966) 12
Outwater v. Miller, 215 N.Y.S.2d 838 (1961) 11
Owens v. Combustion Engineering, Inc., 279 F. Supp. 257 (E.D. Virg., 1967) 12

Palladay v. Bergin, 78 Nev. 441, 375 P.2d 544 (1962) .. 11
Picket v. Aglinsky, 110 F.2d 628 (4th Cir. 1967) 12

Rosenan v. City of New Brunswick, 93 N.J. Super. 49, 224 A.2d 689 (1966) 11

Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 (1935) 12
Silver v. Silver, 280 U.S. 117 (1929) 6
Sonbergh v. MacQuarrie, 112 Cal. App.2d 771, 247 P.2d 133 (1952) 10
Swartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 287 N.Y.S. 2d 714, 188 N.E.2d 143, cert denied 374 U.S. 808 (1963) 11

Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962) 11

United States v. American Union Transport, 327 U.S. 437 (1945) 16

Vaughn v. Langmack, 236 Or. 542, 390 P.2d 142 (1964) 12
Vilscinskas v. Sears and Roebuck Co., 144 Conn. 170, 127 A.2d 814 (1956) 10, 13

Wellston Co. v. Hodges, 114 Ga. App. 424, 151 S.E.2d 481 (1966) 10

Other Authorities

Annotation, 4 A.L.R.3d (1965) 9

Uniform Commercial Code, § 2-725 9

Statutes

Connecticut Gen. Stat. Annotated, § 52-584 17

Tennessee Code Annotated, § 28-304 ..... 1, 2, 3, 17, 18

U.S. Constitution, Amendment XIV 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-746

J. W. HARGROVE,
Plaintiff-Appellant,

vs.

W. L. NEWSOM, et al.,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS APPEAL

Appellees move that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question. This is an appeal from a decision of the Supreme Court of Tennessee rejecting Appellant's contention that **Tennessee Code Annotated** 28-304, as it existed prior to its amendment in 1969, denied to the Plaintiff equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Tennessee Code Annotated 28-304, as it existed prior to its amendment on May 20, 1969, stated as follows:

> "**28-304. Personal tort actions—Malpractice of attorneys—statutory penalties.**—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, and statutory penalties shall be commenced within one (1) year after cause of action accrued."

The Supreme Court of the State of Tennessee has consistently ruled that the cited statute is applicable to all actions in tort for injuries to the person, including those counts of a products liability type lawsuit which are based on tort law (as distinguished from the law of express or implied warranties). The Supreme Court of Tennessee has also ruled, in a consistent line of cases dating back at least to 1934, that where the tortious conduct complained of is not contemporaneous with the injuries received, the cause of action "accrues" on the date of the tortious conduct. **Albert v. Sherman**, 167 Tenn. 133, 67 S.W.2d 140 (1934). In **Jackson v. General Motors Corporation**, 223 Tenn. 12, 441 S.W.2d 482, Cert. denied, 396 U.S. 942 (1969), the Supreme Court of Tennessee specifically held that in a products liability situation, the cause of action accrues at the time of the sale of the product, not at the time of the injury.

When the Plaintiff, Hargrove, brought this products liability suit in the Circuit Court for Davidson County, Tennessee on September 20, 1969, based in part on tort counts which accrued in July of 1967, the Defendants demurred to the tort counts on the basis of the Statute of Limitations, **T.C.A.** 28-304. The Trial Court sustained the

Defendants' demurrers, and the Supreme Court of Tennessee affirmed. **Hargrove v. Newsome**, ... Tenn. ..., 470 S.W.2d 348 (1971).

As the Defendants understand the Plaintiff's constitutional arguments, the Plaintiff-Appellant is asserting that the statute, **Tennessee Code Annotated** 28-304, as interpreted before its amendment in 1969, violated the equal protection clause because:

> "Under **Jackson**, the class of Plaintiffs who is dealing with the product manage not to be injured until the product is one year old, is completely barred from access to the Courts. On the other hand, those Plaintiffs who do not avoid injury for such a period are allowed to maintain an action. This differentiation, which is made without the justification of a compelling interest, is impermissible under the equal protection clause."
>
> **Jurisdictional Statement**, p. 24.

The Plaintiff alleges that the statute, as interpreted, violates the due process clause because:

> "[U]nreasonably short limitations periods are contrary to due process of law . . . [and] . . . **Jackson's** limitation is so short that it denies a reasonable opportunity to be heard . . ."
>
> Jurisdictional Statement, pp. 21, 22.

The argument which follows will deal with both of these contentions together and demonstrate that the Plaintiff's argument does not present a substantial Federal Constitutional question.

I

A "RIGHT TO BE HEARD" IS NOT AT ISSUE IN THIS CASE; AT ISSUE IS THE SUBSTANTIVE RIGHTS, LIABILITIES, AND IMMUNITIES OF THE RESPECTIVE PARTIES.

Throughout the Plaintiff's **Jurisdictional Statement**, the phrases "denied a reasonable opportunity to be heard," "denial of access to the courts" and denial of an "opportunity to make appearance and present facts relevant to the issues to the tribunal charged with adjudication of the interests involved," are repeated again and again, as if the Plaintiff had actually been denied an opportunity to be heard or had been denied access to the Courts of Tennessee. To the contrary, however, the Plaintiff was heard by the Trial Court, his Declaration was reviewed, for the purposes of the hearing on the demurrer as if everything contained therein was true, and he was heard again by the highest court in the state. The result to which Plaintiff's appeal is addressed is the application of state substantive law to the uncontroverted facts of his case. The outcome would have been no different if the Jury had been seated, Plaintiff's and Defendants' proof been presented, summations made, and a judgment handed down. Reduced to essentials, the Plaintiff's version of the facts simply fails to fall within the legal bounds necessary for the Plaintiff to recover from the particular Defendants which he sued, because the Statute of Limitations had expired as to these particular Defendants when the Plaintiff brought his suit.

The troublesome question of whether Statutes of Limitations are procedural or substantive was analyzed carefully by this Court in **Guaranty Trust Co. v. York**, 326 U.S. 99 (1944). A distinction seemed to be required in that case because the application of the doctrine of **Erie v. Tompkins**, 304 U.S. 64 (1938), was at issue. This Court candidly

noted that the crux of the procedural-substantive issue, for **Erie** purposes at any rate, was whether Statutes of Limitation are outcome determinative.

> "... [T]he question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result . . ."
> 326 U.S. at 109.

This Court went on to hold that Statutes of Limitations, being outcome determinative, were to be treated as substantive law effecting the rights of the parties, regardless of what they are called, and as such, state law was controlling.

In its simplest terms, therefore, the Plaintiff's constitutional attack is not against some arbitrary court rule of procedure which "denied him access to the courts," but to state substantive statutory law which delineates the basic rights, liabilities, and immunities affecting this Plaintiff, these Defendants, and all others similarly situated, and it is on that basis that the Constitutional attack must be weighed and evaluated.

II

NO SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE IS PRESENTED BY TENNESSEE'S UTILIZATION OF A DATE OF SALE RELATED STATUTE OF LIMITATIONS IN PRODUCTS LIABILITY CASES.

The Plaintiff alleges an unreasonable "classification" between plaintiffs injured by old products and those injured by new ones, and alleges that the Tennessee Statute

of Limitations is "unreasonably short" and consequently violates his due process rights. In **Binkley v. Dow Chemical Corp.**, Civil No. 4477 and 4478 (U.S. Dist. Ct. for M.D. Tenn. filed September 24, 1971), a copy of which has been set out in the Appendix, the Honorable R. Clure Morton capably pointed out the primary flaw in the Plaintiff's constitutional reasoning:

> "It is submitted that no one has a property or personal right in particular rules of law. A Legislature may eliminate entirely causes of action based on claims of negligent conduct. Therefore, would it not have the power to circumscribe the times within which injuries must occur in order to be actionable in its courts, whether by such a statute of limitation is labeled 'procedural' or 'substantive'?"
>
> Appendix, pp. A-8-A-9.

The District Court went on to refer to three specific instances in which statutory law denied plaintiffs their right to recover where they would otherwise seem to have an actionable claim and where the statute involved was tested on Constitutional grounds before this Honorable Court.

In **Silver v. Silver**, 280 U.S. 117 (1929), where the Constitutional attack was directed against the Connecticut guest passenger statute, this Court wrote:

> "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object . . . The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute . . . whether there has been a serious increase in the evils of vexatious litigation in

> this class of cases, where the carriage is by automobile, is for legislative determination and, if found, may well be the basis of legislative action further restricting the liability. **Its wisdom is not the concern of the courts**" (Emphasis added).
>
> 280 U.S. at 122, 123.

An injured employee, anxious to escape the bounds of the Texas Workmen's Compensation Act and to proceed against his employer in negligence, attacked the constitutionality of the Texas Workmen's Compensation Act before this Court in **Middleton v. Texas Power and Light Co.**, 249 U.S. 152 (1919). Addressing its attention to the "equal protection" argument asserted, this Court noted:

> "There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds".
>
> 249 U.S. at 157.

With respect to the "due process" argument, this Court held:

> "But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the imposition of liability without fault, and the exemption from liability in spite of fault,—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling

> or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers."
>
> 249 U.S. at 163.

A similar unsuccessful constitutional attack was made against the Federal Labor Employment Act in **Mondou v. New York, N.H. & H.R. Co.**, 223 U.S. 1 (1912).

Not referred to in the opinion in **Binkley v. Dow Chemical Co.**, *supra*, but excellent examples of laws which bar or limit an otherwise good claim, through no fault of the plaintiff, include the laws of governmental immunity, charitable immunity, family immunity, limitation of liability in maritime tort claims, the fellow servant rule, wrongful death cases (prior to wrongful death statutes), limitations on the recovery in wrongful death statutes (as in Colorado, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, South Dakota, Virginia and Wisconsin), and most ominously, no-fault automobile insurance schemes.

The controversy between advocates of "date of sale" related products liability Statutes of Limitations and "date of injury" related statutes has plagued legislatures, the courts, and legal scholars for quite some time. Products liability theory has been in a state of flux for decades, and the Statute of Limitations dilemma has been part of that flux.

Needless to say, the "date of sale" view, although the minority view, has seen widespread application in state jurisdictions. As late as 1965, an annotation on the subject warned plaintiff's attorneys that:

"One traditional rule as to commencement of the running of limitation against causes of action based on negligence is that the statute runs from the time of the negligent act or omission, even though the total damage sustained cannot be ascertained until a later date."

4 ALR 3rd at 830.

The Uniform Commercial Code, as adopted by the National Conference of Commissioners on Uniform State Laws, has a four year "date of sale" related Statute of Limitations:

"Section 2-725. Statute of Limitations in Contracts for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

Uniform Commercial Code, Sec. 2-725.

Numerous cases reflect various jurisdiction's application of "date of tortious conduct" or "date of sale" related statutes, applied in a variety of situations, including products liability cases, all with the potential of barring a given claim before the Plaintiff has an opportunity to bring it. Some of these are reflected in the chart below,

but discussion of them seems unnecessary for the purpose of this Motion. Many of the cases which follow, including **Jackson v. General Motors,** *supra*, from Tennessee, have been overruled by legislative enactment or judicial reconsideration, but no effort has been expended to survey the law as it stands now, since the purpose of the chart is merely to demonstrate the wide acceptability of the "date of tortious conduct", "date of sale" or "date of wrongful act" theory.

Arkansas:

Field v. Gazette Pub. Co., 187 Ark. 253, 59 S.W. 2d 19 (1933).

California:

Sonbergh v. MacQuarrie, 112 Cal. App. 2d 771, 247 P.2d 133 (1952).

Connecticut:

Dincher v. Marlin Fire Arms Co., 198 A.2d 821 (2d Cir. 1952);

Vilcinskas v. Sears and Roebuck Co., 144 Conn. 170, 127 A.2d 814 (1956).

Delaware:

L. E. Talcott & Sons, Inc. v. Aurora Corp., 176 F. Supp. 783 (D. Del. 1959).

Florida:

Meyer v. Roth, 189 So.2d 515 (Ct. App., Fla. 1966);

Houston v. Florida-Georgia Television Co., Inc., 192 So.2d 340 (Ct. App., Fla. 1966).

Georgia:

Wellston Co. v. Hodges, 114 Ga. App. 424, 151 S.E.2d 481 (1966).

Iowa:

Ogg v. Robb, 181 Iowa 145, 162 N.W. 217 (1917).

Maryland:

Kitten v. George Washington Cemetery Inc., 231 Md. 337, 180 A.2d 247 (1963).

Nevada:

Palladay v. Bergin, 78 Nev. 441, 375 P.2d 544 (1962).

New Jersey:

Rosenan v. City of New Brunswick, 93 N.J. Super. 49, 224 A.2d 689 (1966).

New York:

Outwater v. Miller, 215 N.Y.S.2d 838 (1961);

Swartz v. Heyden Newport Chemical Corp., 12 N.Y.2d 212, 287 N.Y.S.2d 714, 188 N.E.2d 143 Cert. Denied 374 U.S. 808 (1963);

Mendel v. Pittsburg Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

North Carolina:

Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962);

Land v. Neil Pontiac, Inc., 6 N.C. App. 197 (1969);

Jewell v. Price, 264 N.C. 459, 143 S.E.2d 1 (1965);

Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

Ohio:

Baldridge v. Toombs, 90 Ohio L. Abs. 425, 230 Ohio Op.2d 404, 189 N.E.2d 177 (1962).

Oregon:

Industrial Chrome Plating Co. v. North, 175 Or. 351, 153 P.2d 835 (1944);

Vaughn v. Langmack, 236 Or. 542, 390 P.2d 142 (1964).

Tennessee:

Bodne v. Austin, 156 Tenn. 366, 2 S.W.2d 104 (1928);

Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934);

Goodall Company v. Sartain, 141 F.2d 427 (6th Cir. 1944), Cert. Denied 323 U.S. 709 (1944);

Hall v. DeSaussure, 41 Tenn. App. 572, 297 S.W. 2d 81 (1956);

Jackson v. General Motors, 223 Tenn. 12, 441 S.W. 2d 482 (1968) Cert. Denied 346 U.S. 942 (1969);

Flynn v. Camp, ... Tenn. ..., 470 S.W.2d 347 (1971);

Hargrove v. Newsome, ... Tenn. ..., 470 S.W. 2d 348 (1971).

Texas:

Olson v. Passero, 402 S.W.2d 953 (Ct. App., Texas 1966).

Virginia:

Morgan v. Schlanger, 374 F.2d 235 (4th Cir., 1967);

Owens v. Combustion Engineering, Inc., 279 F. Supp. 257 (E.D. Virg., 1967).

West Virginia:

Picket v. Aglinsky, 110 F.2d 628 (4th Cir. 1940);

Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 (1935).

Only a few of the opinions cited discuss the policy reasons behind a date of tortious conduct related statute, but the policy reason is obvious, and was pointed out concisely in **Vilcinskas v. Sears, Roebuck & Co.**, 144 Conn. 170, 127 A.2d 813 (1956):

> "There is no reason, Constitutional or otherwise, which prevents the legislature from enacting a statute, such as Section 8324, which starts the limitation on actions for negligence running from the date of the act or omission complained of even though at that date no person sustained damage and therefore no cause of action has come into existence . . . If a person is to be sued for negligence, the claim that he is liable should, in fairness, be brought to his attention soon enough after the claimed act of negligence to permit witnesses to be available for his defense. Accordingly, it is in harmony with the theory of statutes of limitations to make the time for bringing the actions start at the time of the occurrence of the alleged negligence and not at the time when the injured person sustained damages. It is consonant with the purpose of protecting defendants against stale claims that the legislature should enact a statute such as Section 8324, which may on occasion bar an action even before the cause of action accrues."
>
> 127 A.2d 816.

The products liability action "strict liability in warranty" (implied warranty without privity) as first described in the landmark **Henningston v. Bloomfield Motors, Inc.**, 32 N.J. 358, 151 A.2d 69 (1961), although not recognized by Tennessee, is equated by the Court of Appeals of New York with strict liability in tort, which Tennessee recognizes but New York does not. The Court of Appeals of New York, regarded as one of the most prestigious and progressive state supreme courts in the

nation, ruled in **Mendel v. Pittsburg Plate Glass Co.**, 25 N.Y.2d 340, 253 N.E.2d 207 (1969), that a date of sale related statute of limitations applied to the products liability action, and went on to explain why they would not change their "date of sale" view even if they thought they had the authority to do so:

> "In conclusion, if the case presented merely an open policy question, which as evidenced from the discussion above we do not believe, we would nevertheless affirm. We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after a product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limitations applicable to the instant action and limit appellants to their action in negligence."

In **Hargraves v. Brackett Stripping Machine Co.**, 317 F. Supp. 676 (E.D. Tenn., 1970), the Honorable Frank W. Wilson ruled on the Constitutionality of the Tennessee Statute of Limitations in question in this appeal. Judge Wilson, as with Judge Morton in **Binkley v. Dow Chemical Co.**, *supra*, could find no Constitutional objections to the statute's date of sale operation.

> ". . . [T]he relevant test of due process here is basically the test of reasonableness. If in balancing the conflicting interests of the parties reason can be established, or, stated in reverse, if a lack of arbitrariness can be established in the selection of the

date of the wrongful act or the date of the sale of a defective product as the inception date for the running of the statute of limitations in a personal injury action, no constitutional attack on such legislation would lie. Since in every personal injury lawsuit the proof must include evidence of a breach of duty, a wrongful act or a defect in a product, the effect of the lapse of time in the availability of proof of such matters would not be an unreasonable concern for a legislative body to have in mind in the enactment of a statute of limitations. The reasonableness of such a concern becomes the more weighty when it is recognized that in by far the great majority of personal injury cases the wrongful act and the injury follow in close sequence, with no significant lapse of time between the two. Only in a relatively few instances will there be a significant time interval between the two, with product liability cases furnishing the most frequent illustration of such an interval. Even in product liability cases the lapse of time between the wrongful act or the sale of a defective product and the occurrence of the injury is often not a significant one.

When the foregoing matters are weighed against the right of an injured party to seek judicial relief in the exceptional instance where more than a year has elapsed between the wrongful act or the sale of a defective product and the injury, this Court is of the opinion that legislation adopting the date of the wrongful act or the date of the sale of the defective product as the inception date for the running of a statute of limitations cannot be said to be so arbitrary or capricious as to fall under the ban of the Due Process Clause. A statute of limitations must be judged in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class,

it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance. **Lamb v. Powder River Livestock Co.** (C.A. 8) 132 F. 434; **Allen v. Mottley Construction Co.**, 160 Va. 875, 170 S.E. 412. In reaching this conclusion it should be emphasized that the role of the Court is not to pass upon the wisdom or lack of wisdom of the legislation involved. The courts do not sit to review the wisdom of legislation or regulation by public bodies, for these matters address themselves solely to the legislative or regulating body. **United States v. American Union Transport**, 327 U.S. 437, 66 S.Ct. 644, 90 L.Ed. 772 (1945)."

317 F. Supp. at 683.

The Sixth Circuit Court of Appeals subsequently distinguished **Hargraves** from **Jackson v. General Motors**, *supra*, on non-constitutional grounds, and reversed and remanded in an unreported opinion. A motion for summary judgment is again pending in the District Court, based on the more recent decision of the Supreme Court of Tennessee in the case at bar.

Cases such as **Mickle v. Blackman**, 252 So.C. 261, 166 S.E.2d 173 (1969), in which a recovery was had based on a "design defect" in automobile which was fourteen years old when the injuries occurred, and **Hargraves v. Brackett Stripping Machine Co., Inc.**, *supra*, in which a recovery is being sought against the manufacturer of a "defective" folding machine which was manufactured and sold new to a Massachusetts factory forty years ago represent two cases which demonstrate the gross injustice of a date of injury related Statute of Limitations in products liability actions.

If this Court were to assume the responsibility for drafting a particularly enlightened Statute of Limitations

Act for the State of Tennessee, it would seem that the statute which was adopted by the Legislature of Connecticut is particularly well suited to products liability cases, and would serve as an excellent or perhaps model:

> "Conn. Gen. Stat. Ann., Sec. 52-584. **Limitations of action for injury to person or property.** No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within one year from the date when the injury is sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . ."

Neither **T.C.A.** 28-304, as it was before the amendment of 1969, nor **T.C.A.** 28-304 as it exists after the amendment of 1969, reflect great wisdom or care on the part of the Legislature of the State of Tennessee. Nevertheless, prior to the amendment of 1969, the Legislature permitted a "date of wrongful act" statute of limitations to remain in effect, despite the fact that the particular hardship which could occur in some instances was specifically pointed out by the Supreme Court of Tennessee as early as 1934, in **Albert v. Sherman**, 167 Tenn. 133, 67 S.W.2d 140 (1934). The Tennessee statute did not deny anyone any "right to be heard" but merely required that any suit based on a product related injury be brought against a party defendant with some reasonable time related connection with the product in question.

In some future date or age, perhaps the state of industrial technology will develop to the point where all mechanical devices will endure and function to infinity, regardless of the degree of abuse, neglect, wear and tear

or strain which its owners may subject them. Until such time, in the absence of a date of sale related Statute of Limitations, the manufacturer becomes a virtual insurer of the perpetual impregnability of its products, a premise which we all know to be unachievable. It is submitted that nothing in the Constitution of the United States requires a state legislature or a state Supreme Court to create such a burdensome liability to manufacturers, although in its discretion, the legislature may do so, and has done so since 1969 in Tennessee.

Regardless of the pros and cons of a date of sale related Statute of Limitations in products liability cases, or the public policy considerations involved, it seems clear that **T.C.A.** 28-304, as in effect prior to its amendment in 1969, was well within the bounds of legislative discretion recognized by this Court. The contention that as applied to Appellant it denies due process or equal protection of the laws in violation of the Fourteenth Amendment presents no substantial federal question. Appellees' motion to dismiss the appeal should be sustained.

Respectfully submitted

JOHN K. MADDIN, JR.
500 Court Square Building
Nashville, Tennessee 37201
Attorney for Appellee,
Kelley Co., Inc.

JAMES C. SUMMERS
300 Court Square Building
Nashville, Tennessee 37201
Attorney for Appellee
W. L. Newsome

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Jeannette E. Binkley and Charles A. Glidwell vs. Dow Chemical Company and Ethyl Corporation	Civil Actions Nos. 4477, 4478 (Consolidated Cases)
Mrs. Pauline Pace vs. R. H. Buhrke Company, Inc. and United States Forgecraft Corporation	Civil Action No. 4561

MEMORANDUM OPINION

(Filed September 24, 1971)

The three above-styled cases are suit by employees or representatives of employees for injuries and wrongful death brought on the theory that their injuries and deaths were caused by third-party tortfeasors who dealt with the employers of the employees.

In the Pace suit, defects in certain safety belts were alleged. The belts were sold and delivered to the employer on January 25, 1965. The injury to the employee occurred on October 23, 1965, and the suit instituted on October 12, 1966. In the Binkley and Glidwell cases, the allegations were that the third-party tortfeasors furnished the employer defective cleaning compounds. The date of the delivery was May 13, 1965, the employees were injured on May 18, 1965, and their suits were filed on May 18, 1966.

The causes of action are based on common law negligence, express and implied warranties, strict liability, and misrepresentation, fraud and deceit.

Pretrial conferences have been held, motions for summary judgment made, and briefs filed. There is no material dispute as to the facts insofar as they are applicable to the motions for summary judgment filed by the respective defendants. The motions for summary judgment in effect assert that the common law negligence allegations, the action in tort relying upon misrepresentation, fraud and deceit, and strict liability are barred by the one-year statute of limitations, T.C.A. 28-304. As to the allegations of breach of implied and express warranty, it is asserted that the pleadings reflect, and no contention is made to the contrary, that no privity exists between employees and defendants, such privity being a condition precedent to liability under the law of Tennessee.

Implied and Express Warranty

Under the law in Tennessee, by which we are bound under the doctrine of **Erie v. Tompkins**, 304 U.S. 64 (1933), it is well established that privity is a necessary condition precedent to liability in tort, based on allegations of breach of implied and express warranties. The case of **Hargrove v. Newsome**, ... Tenn. ..., ... S.W.2d ... (June 7, 1971), reasserted the necessity for privity. The court in that case stated further that the requirement for privity was reasserted by the legislature of the State of Tennessee by its enactment of T.C.A. 47-2-318. This provision made certain exceptions to the necessity of privity by extending warranties (express and implied) to certain classes of defined persons. Since the plaintiffs in the cases at bar do not fall within the exceptions, this Court, in accordance with the rationale of the previous decisions in the State of Tennessee, and in particular the case of

Hargrove v. Newsome, *supra*, holds that the plaintiffs do not state a cause of action based on their allegations of breach of implied or express warranty.

Statute of Limitations

The plaintiffs recognize that the State of Tennessee in the case of **Hargrove v. Newsome**, *supra*, applied the one-year statute of limitations, T.C.A. 28-304 (as it existed prior to its amendment), to common law negligence and strict liability suits in tort and asserted that the statute of limitations began to run from the date of the negligent act or the time of sale, whichever is applicable. Pertinent language in that decision is as follows:

> "The negligence and strict liability counts were dismissed on authority of **Jackson v. General Motors Corporation**, ... Tenn. ..., 441 S.W.2d 482 (1969). In the supplemental brief plaintiff cites three recent cases arising out of the United States District Courts in Tennessee to support an argument that under the facts of the case at bar **Jackson v. General Motors Corporation**, *supra*, is not applicable. We have carefully considered the federal cases cited and are of the opinion **Jackson v. General Motors Corporation**, *supra*, is applicable to the case at bar. In **Jackson v. General Motors Corporation**, *supra*, we held the applicable statute, T.C.A., § 28-304 (prior to amendment), commences to run at the date of the wrongful act or omission whether the damages occasioned were on the same date or later. In the case at bar the wrongful act or omission was occasioned on the date of the sale (July 8, 1966), and suit was not filed within one year from that date.
>
> "The Court was at the time of its consideration of **Jackson v. General Motors Corporation**, *supra*, and is now, fully aware that the decision in Jackson could

and very likey would cause hardships in certain cases. The decision in **Jackson** was controlled by the decision in **Albert v. Sherman,** 167 Tenn. 133, 67 S.W.2d 140 (1934), and in both of these cases the Court was careful to point out the fact such hardships could result. Even so, during the thirty-four year period between **Albert** to **Jackson** the Legislature did not see fit to change the language of the statute at issue. Since **Jackson,** the Legislature has seen fit to make material changes in the statute." Opinion on Petition to Rehear.

The **Hargrove** case was preceded by the Tennessee Supreme Court's decision in **Bates v. Shapard,** ... Tenn. ..., 461 S.W.2d 946 (December 7, 1970). Again, the Tennessee court, in applying T.C.A. 28-304 (prior to amendment), held that the cause of action for personal injuries to a guest passenger accrued from the date of purchase of the automobile and not the date of injury to the passenger. Thus, nothing else appearing, it seems clear that the plaintiffs' actions were barred by T.C.A. 28-304 prior to the time the suits were filed.

However, the plaintiffs state that T.C.A. 50-914 of the Workmen's Compensation Act creates a new and different statute of limitations which applies only to persons who were injured within the scope of their employment by the tortious acts of third persons. The reverse of this situation is that any person who is injured by the tortious act of a third party, but not while in the scope of his employment, does not receive the benefit of this so-called special statute of limitations.

The language relied upon is contained in the third paragraph of T.C.A. 50-914, which is quoted as follows:

> "Such action against such other person by the injured workman, or those to whom his right of action survives, must be instituted in all cases within one (1)

year from the date of injury. Failure on the part of the injured workman, or those to whom his right of action survives, to bring such action within said one (1) year period shall operate as an assignment to the employer of any cause of action in tort which the workman, or those to whom his right of action survives, may have against any other person for such injury or death, and such employer may enforce same in his own name or in the name of the workman, or those to whom his right of action survives, for such employer's benefit, as such employer's interest may appear, and the employer shall have six (6) months after such assignment within which to commence such suit."

Section 50-914 of the Workmen's Compensation Act of the State of Tennessee has had an interesting legislative history. Prior to 1949 an employee injured while in the scope of his employment as a result of the negligence of a third-party tortfeasor could proceed to judgment against both his employer (insurance carrier) and against the third-party tortfeasor, but could obtain only one satisfaction. Thus, when an injured employee proceeded against his employer and received satisfaction, the third-party tortfeasor escaped responsibility to the injured employee. The statute of limitations on that action was one year as set-forth in T.C.A. 28-304. That action was barred one year from the date of the wrongful act or omission, or the date of the sale of the article which may have caused the injury. **Hargrove v. Newsome**, *supra*.

In order to prevent the third-party tortfeasor from escaping liability for his wrongdoing, that provision of the Workmen's Compensation Act, T.C.A. 50-914, was amended. This amendment did not grant to the injured employee a new cause of action against the third-party wrongdoer. It did, however, create a statutory right of

subrogation in the employer (insurance carrier). In addition, absent a suit by the employee within one year from the date of the injury, it provided for the assignment of the rights of the injured employee (whatever these rights may be) to the employer (insurance carrier) so that the employer could file a direct suit against the third-party tortfeasor to recover any amounts paid out by the employer (insurance carrier). To provide a practical mechanical administrative method, the 1949 amendment stated in effect that if the employee did not bring the suit within said one year, he lost his right to bring it, and the employer had a right to bring suit against the third-party tortfeasor within six months after the termination of the one-year period limiting the right of the employee to sue. It seems clear that the legislature recognized the fact that prior to the 1949 amendment the employee could enter into an agreement with the third-party tortfeasor that the employee would sue his employer, obtain judgment, and wait until the elapse of the statute of limitations as defined by T.C.A. 28-304, and then settle with the third-party tortfeasor, thus denying the employer the right of subrogation. This procedure presupposes that the third-party tortfeasor waived in favor of the injured employee the one-year statute of limitations so as to promulgate this scheme. As a matter of fact, cases have arisen under the Workmen's Compensation Act which indicate that this was a practical scheme. Thus, to prevent the deprivation of rights of the employer and the insurance carrier, but still not to infringe upon or limit the rights of the employee, the 1949 amendment required the employee to bring his personal injury suit against the third-party tortfeasor within one year from the date of the injury, regardless of whether the third-party tortfeasor agreed to extend the T.C.A. 28-304 one-year statute of limitations. The failure to bring said suit within one year would constitute an automatic assignment to the employer or the employ-

ers' insurance carrier of "any cause of action in tort which the workman or those to whom his right of action survives, may have against any other person for such injury or death."

It is clear to this Court that T.C.A. 50-914 did not modify or extend the statute of limitations as defined by T.C.A. 28-304.

The plaintiffs call to the Court's attention an opinion in the case of **Hindman v. City Tank Corporation**, Civil No. 5472 (E.D. Tenn. December 14, 1970), which case reached a contrary conclusion. This Court respectfully disagrees with the conclusion reached in said opinion.

Constitutional Questions

The plaintiffs assert that the application of the rule of **Hargrove v. Newsome**, *supra*, and **Jackson v. General Motors Corporation**, ... Tenn. ..., 441 S.W.2d 482 (1969), cert. denied 346 U.S. 942 (1969), constitutes a retroactive application of a "new" statute of limitations.

The Supreme Court of Tennessee has been careful to point out that the decision of **Jackson v. General Motors Corporation**, *supra*, has been in existence for over thirty-four years. **Hargrove v. Newsome**, *supra*. However difficult it may be to accept, the Supreme Court of Tennessee has stated that **Jackson v. General Motors Corporation**, *supra*, and the subsequent cases are not asserting a new or different interpretation of the statute of limitations (T.C.A. 28-304), but that it is the same statute of limitations and the same interpretation that has been in existence and applied by the Court in excess of thirty-four years. Inferentially, the Supreme Court of Tennessee is saying that the lawyers and the legal authorities have failed to recognize the rule that has been in existence. Certainly this Court is in no position to assert that the Su-

preme Court of Tennessee is in error in this position. **Erie v. Tompkins**, *supra*. Therefore, this Court must hold that **Jackson v. General Motors Corporation**, *supra*, and the succeeding cases have not shortened the time period for the filing of a personal injury suit, nor has it applied a new rule retroactively.

The next question raised is whether a pre-injury time bar is a violation of due process.

The pre-injury time bar, i.e., a statute of limitations running from conduct and not from harm has ancient antecedents in actions on slander. In the case of **Brownlow v. Jones**, 33 Tenn. 170, the Supreme Court refers to the Tennessee limitation, other than the period of the time specified, as founded in the acts of 1715 which in turn came from 21 James I, ch. 16, § 3, quoted in part as "within two years next after the words spoken, and not after."

More recent examples of pre-injury bar have been upheld. Certiorari was refused by the United States Supreme Court in **Jackson v. General Motors Corporation**, *supra*. See **Schwartz v. Heyden Newport Chemical Corporation**, 374 U.S. 808 (1963); **Dincher v. Marlin Firearms Company**, 198 F.2d 821 (2d Cir. 1952).

In the case of **Tioga R.R. Co. v. Blossburg Corning R.R. Co.**, 87 U.S. 137 (1874), the Supreme Court characterized statutes of limitations as follows:

> "Statutes of Limitations are in their nature arbitrary. They rest upon no other foundation than the judgment of the State as to what will promote the interest of its citizens. Each determines such limits and imposes such restraints as it thinks proper."

It is submitted that no one has a property or personal right in particular rules of law. A legislature may elim-

inate entirely causes of action based on claims of negligent conduct. Therefore, would it not have the power to circumscribe the times within which injuries must occur in order to be actionable in its courts, whether by such action a statute of limitation is labeled "procedural" or "substantive"?

As an example, a state statute eliminating a cause of action by a guest passenger against his host driver on grounds of ordinary negligence was upheld by the United States Supreme Court in **Silver v. Silver**, 280 U.S. 117, 122 (1929), saying:

> "As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Saltonstall v. Saltonstall, 276 U.S. 260, 72 L. ed. 565, 48 Supreme Court Rep. 225. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, **or the abolition of old ones recognized by the common law**, to attain a permissible legislative object" (Emphasis supplied.)

The elimination of a cause of action against fellow employee through enactment of workmen's compensation laws was upheld in **Middleton v. Texas Power & Light Company**, 249 U.S. 152, 163 (1919), wherein the court said in part:

> "But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the

effect to be given to them, the rule of respondeat superior, **the imposition of liability without fault, and the exemption from liability in spite of fault,**—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers." (Emphasis supplied.)

The enactment of FELA legislation produced **Mondou v. New York, N. H. & H. R. Company**, 223 U.S. 1 (1912), wherein the court said, in part:

"First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances'." 223 U.S. 1, 50.

In **Patterson v. Colorado**, 205 U.S. 454, 461 (1907), Justice Holmes said:

"There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it is true, as the plaintiff in error says, that the Supreme Court of Colorado departed

> from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decision, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

It is submitted therefore, if state jurisdiction has power, to create causes of action and to eliminate causes of action then may not such jurisdiction say that as to harm from a product any action within its courts must be maintained if at all, within a specified period. If the jurisdiction has the power to deny a cause of action in its entirety based upon harm from a product, can a period, whether of one year or one hundred years be deemed beyond the discretion of that jurisdiction.

The law recognizes that injury by another standing alone does not give rise to a protected right—witness unavoidable accident and Act of God. Therefore, can a plaintiff claim a Fourteenth Amendment right that all time limitations must run from harm? Do not real property statutes of limitations cut off future interests? Is a potential tort claimant who has not yet been injured to be granted superior status to a potential claimant to an interest in real estate? See 63 Harv. L. Rev. 1179.

Finally, the Supreme Court of Tennessee in **Ford Motor Company v. Lonon**, 217 Tenn. 400, 398 S.W.2d 240 (1966), adopted the rule of strict liability in tort, Restatement of Torts, § 402 A. Since no such cause existed at common law, is it not within the Tennessee court's prerogative to

determine when the cause of action accrues within the meaning of the applicable statute of limitations? Does not the public policy to bring possible litigation to repose justify a calculation of limitation from a time certain rather than have the possibility of litigation continue for the life of the product which in some cases might be 100 years?

For the aforementioned reasons, the Court is required to sustain the Motions for Summary Judgment and dismiss the original plaintiffs' cases.

Furthermore, since the intervenors assert a derivative right to be subrogated in any recovery which the plaintiffs may obtain, the action of the intervenors is dismissed.

Appropriate orders will be entered in these cases.

/s/ L. CLURE MORTON
United States District Judge